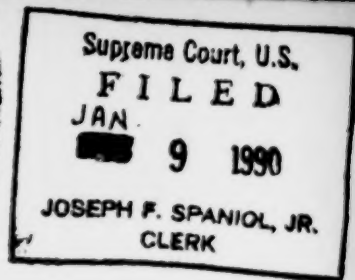


89-1267



No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JEROME B. ROSENTHAL,
Petitioner,

v.

STATE BAR OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
CALIFORNIA

PETITION FOR WRIT OF CERTIORARI
(APPENDICES 1-4 in accompanying,
separate Volume)

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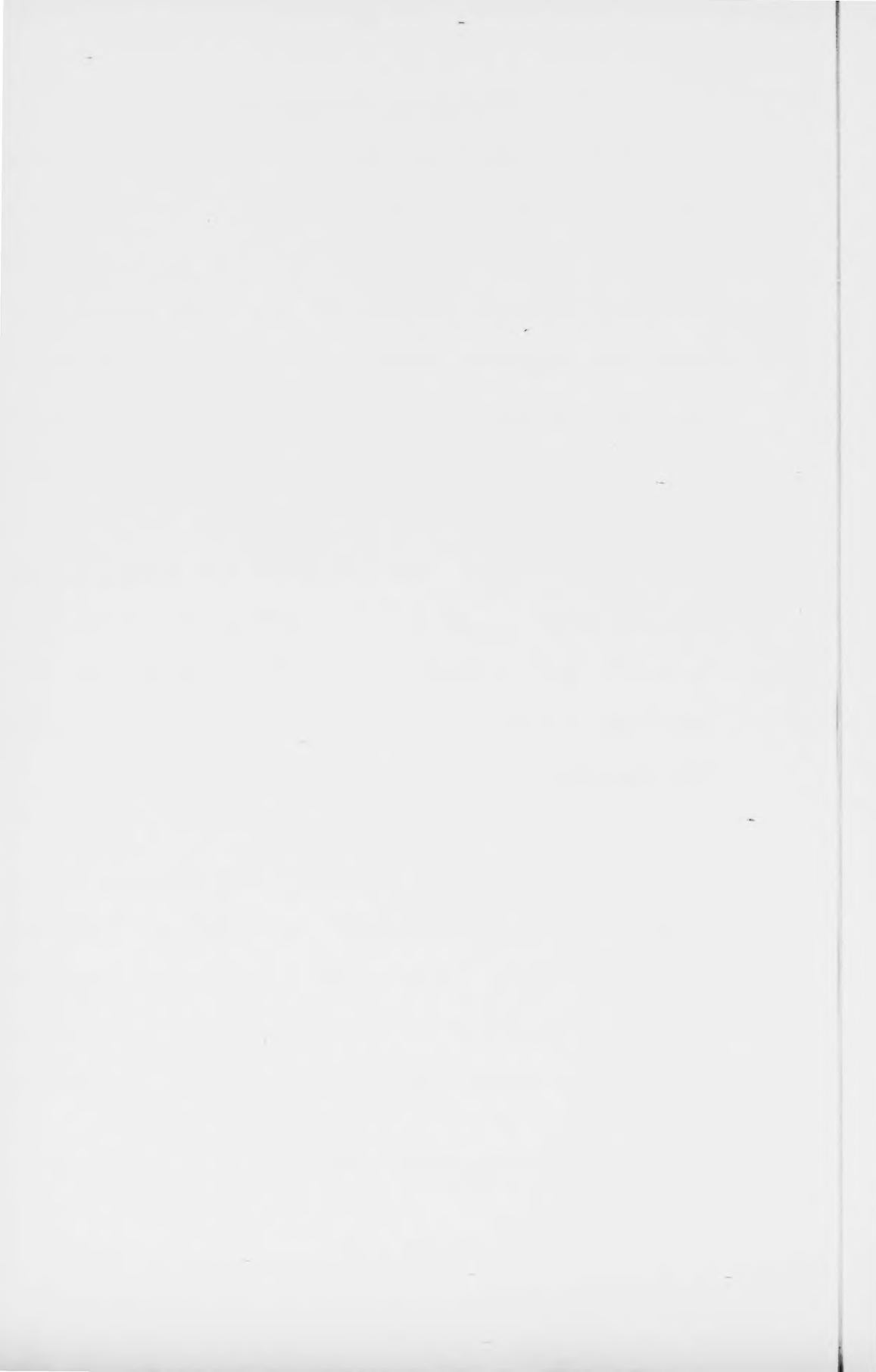


QUESTIONS PRESENTED

1. Whether Section 6083(c) of the California Business and Professions Code ("B & P Code") is facially unconstitutional as violative of the due process clause of the 14th Amendment, when the highest court of the state (acting as de novo tribunal¹) is required by that statute to shift the burden of proof of his innocence to Petitioner (accused, licensed lawyer), in contravention of the rulings of Carella vs. California, ____ U.S. ____, 109 S.Ct. 2419, 105 L.Ed.2d 218 (June 15, 1989); Sandstrom vs. Montana (1979) 442 U.S. 510; and Connecticut vs. Johnson (1983) 460 U.S. 73.

2. Whether a state statute (California B & P Code Section 6049.1) abridging federal constitutional rights of confrontation and cross-examination is facially unconstitutional inherently under the due process clause of the

¹Worth vs. State Bar (1978) 22 C3d 707, 150 Cal.Rptr. 273.



14th Amendment, and under the confrontation
clause of the 6th Amendment.



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STATE BAR OF CALIFORNIA,
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PETITION FOR WRIT OF CERTIORARI

JEROME B. ROSENTHAL, Petitioner,
respectfully prays that a Writ of Certiorari
issue to review the October 11, 1989 Final
Judgment and Opinion of the Supreme Court of
California, denying review, denying issuance
of a Writ of Error Coram Vobis/Nobis, and
rejecting Petitioner's constitutional attack
on two California statutes, viz Business and
Professions Code, Section 6083(c), and
Business and Professions Code, Section 6049.1.

Section 6083(c) is facially
unconstitutional under the 14th Amendment due
process clause because it casts the burden of
proof of innocence upon the Petitioner
(accused lawyer), which action (casting the
burden of proof of innocence upon accused
lawyer) can never be harmless, either on the
ground that intent was not at issue, or that
the Carella-Sandstrom error could be harmless
on the ground of "overwhelming evidence."
Such action upheld the constitutionality of

state statute which shifts the burden of proof of his innocence to the accused and thus reverses and destroys the fundamental right of the presumption of innocence during de novo determination. Carella vs. California was cited in Petitioner's Petition for the Writ of Error in the Supreme Court of California, which Petition (together with Supplement to Petition) is appended hereto, as Appendix 1.

In short, Petitioner correctly anticipated the U.S. Supreme Court's Decision in Carella by citing it in his Petition to the California Supreme Court dated April 10, 1989, while Carella was pending in the U.S. Supreme Court, for hearing on April 26, 1989. Thereafter, this Court announced its decision in Carella on June 15, 1989. In Petitioner's SUPPLEMENT TO HIS PETITION FOR WRIT OF ERROR CORAM VOBIS/NOBIS dated June 20, 1989 which he informed the California Supreme Court that Carella vs California had been decided by this Court exactly as was anticipated by Petitioner



in his original Petition for a Writ of Error, on October 11, 1989 the California Supreme Court rejected Petitioner's contention that clearly B & P Code Section 6083(c) was facially unconstitutional in light of Sandstrom vs. Montana, Connecticut vs. Johnson, and as then reaffirmed by the decision of this Court in Carella.

Additionally, Petitioner's Petition to the California Supreme Court (for Writ of Error Coram Vobis/Nobis April 10, 1989) urged the retroactive application, as a matter of law of this Court's decision in Coy vs. Iowa (June 29, 1988) ___U.S.___, 108 S.Ct. 2798; 101 L.Ed.2d 857 as binding on the California Supreme Court as to cases then pending, as was Petitioner's case. The California Supreme Court in its final judgment rejected Coy vs. Iowa, and upheld the facial constitutionality of B & P Code, Section 6049.1, despite its unconstitutionality under Coy; the rejection squarely presents the federal question of the

facial unconstitutionality of Section 6049.1 in light of the confrontation guarantee enunciated in Coy, thus now posing that issue as being ripe for decision by this Court.

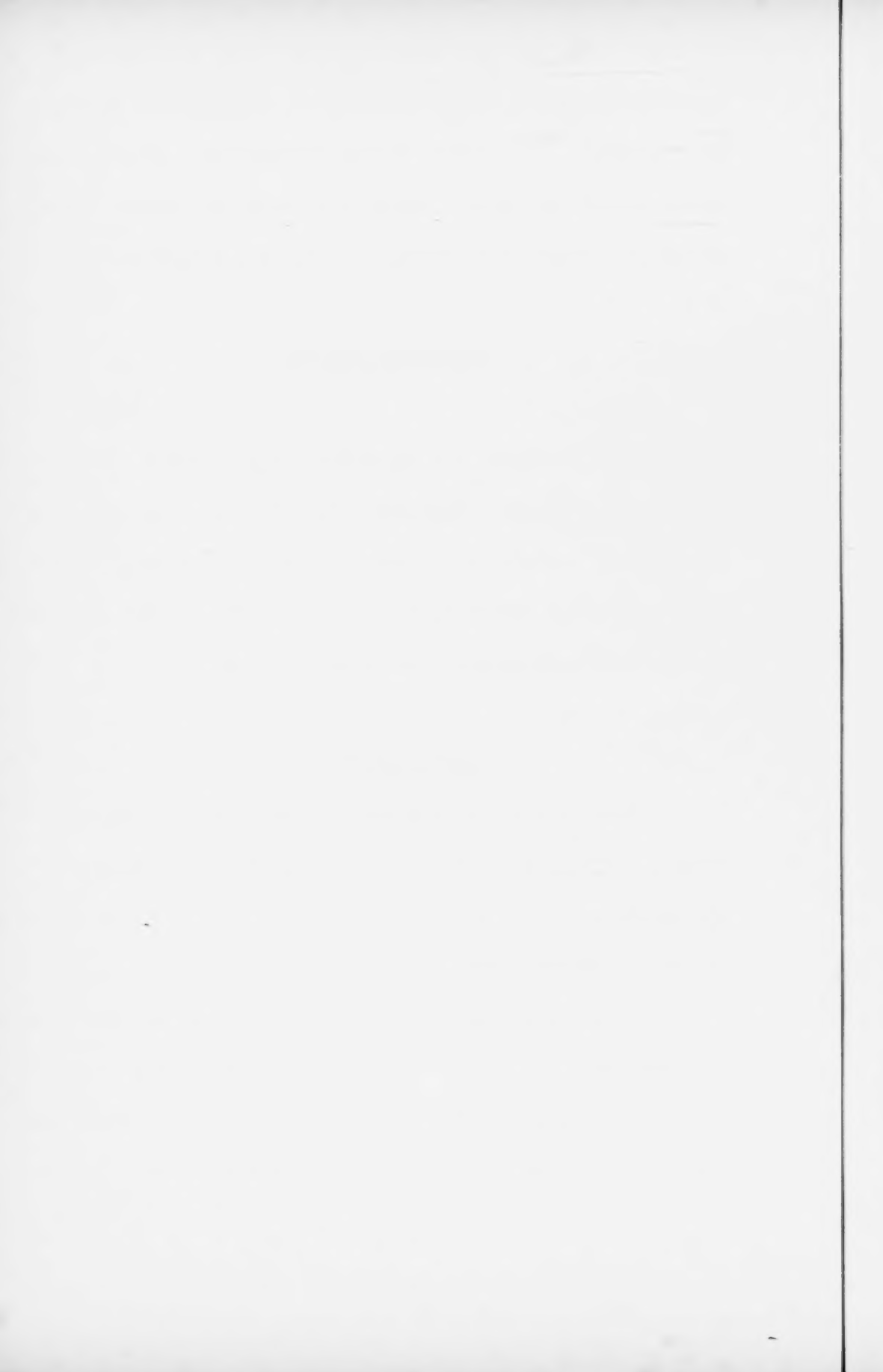
OPINION BELOW

The Order of October 11, 1989 (final action) of the Supreme Court of California denying Petitioner's Petition (and Supplemental Petition) for a Writ of Coram Vobis/Nobis appears as Appendix No. 2.

JURISDICTION

The final judgment (entered October 11, 1989), Appendix 2) of the Supreme Court of California denying Petitioner's Petition for Writ of Error Coram Vobis/Nobis.

A Notice of Appeal (and Amended Notice of Appeal) to this Court from that final judgment was timely filed in the Supreme Court of California on January 5, 1990.



(Appendix 3)

However, in light of rule change effective January 1, 1990, (prohibiting direct appeal from state court judgments) the former appeal, filed January 5, 1990, is being treated by Petitioner as a Petition for issuance of Writ of Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES

6th Amendment, U.S. Constitution:

"In all criminal prosecutions,² the accused shall enjoy the right to a speedy and public trial, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor"

14th Amendment, U.S. Constitution, Section 1:

". . . No state shall make or enforce

² In California, lawyer disciplinary proceedings have been long classified as "quasi-criminal." Golden vs. State Bar (1931), 213 Cal. 237; Furman vs. State Bar (1938) 12 Cal.2d 212, 229; Herrscher vs. State Bar (1935) 4 Cal.2d 399, 403, 421.



any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Business and Professions Code, Cal Statute,

Section 6083(c):

"(c) Upon such review the burden is upon the Petitioner to show wherein the decision or action is erroneous or unlawful."

Business and Professions Code Section 6049.1-

Records and Transcripts in Disciplinary

Proceedings As Evidence:

"In all disciplinary proceedings in this State, certified or duly authenticated copies of findings, conclusions, orders or judgments made or entered in any court of record, or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys, of the United States, or of any State or Territory of the United States or of the District of Columbia in any disciplinary proceedings therein against the same person, shall be admissible in evidence, and so far as relevant and material shall be prima facie evidence of the facts, matters



and things set forth therein."

"The duly authenticated transcript of the testimony taken in such out-of-state proceedings shall be admissible in evidence in any disciplinary proceeding against the same person in this State ..."

Petitioner's claim of the facial unconstitutionality of the two California statutes (B & P Code Sections 6083(c), and 6049.1) was presented extensively to the Court of Last Resort (Supreme Court, California) and Petitioner squarely presented federal constitutional challenges to the two statutes specifically based upon opinions of this Court in the cases of Carella vs. California, ___ U.S. ___, 109 S.Ct. 2419, 105 L.Ed.2d 218 (June 15, 1989), Sandstrom vs. Montana (1979) 442 U.S. 510, and Connecticut vs. Johnson (1983) 460 U.S. 73, in support of the federal constitutional challenge to the burden-shifting statute, i.e. B & P Code 6083(c).

Petitioner's claim of the facial unconstitutionality of the second statute,



i.e. B & P Code Section 6049.1 as a codified denial of confrontation under the 6th Amendment, was squarely presented to state court of last resort by Petitioner's contention that Coy vs. Iowa, decided June 29, 1988 while Petitioner's case was pending in the California Court of Last Resort, was retroactively applicable, consistent with Willner vs. Committee, 373 U.S. 96 (1963), which held that "In a situation such as this, (373 U.S. at 104), the need for confrontation is a necessary element of due process."

STATEMENT OF THE CASE

Petitioner petitioned the Supreme Court of California for issuance of a Writ of Error Coram Vobis/Nobis and for vacation of its judgment entered on July 13, 1987 (Rosenthal vs. California State Bar, 43 C3d 612).
(Appendix 4)



That Petition was made on the following grounds:

FIRST GROUND

In its final judgment of October 11, 1989, California Supreme Court again rejected the teaching of Carella and Sandstrom and upheld the constitutionality of the statute, B & P Code 6083(c).

California Supreme Court exceeded its jurisdiction when it refused to follow the binding precedent of the Supreme Court of the United States. As a result of the extrinsic error in the orders of the California Supreme Court, neither in its July 13, 1987 order/judgment nor in its February 18, 1988 order (denying Petition for Rehearing and related relief) did that Court consider, entertain or dispose of the federal question raised and presented by Petitioner, i.e. facial federal unconstitutionality of Business and Professions Code, Section 6083(c), based on Sandstrom vs. Montana and on Connecticut



vs. Johnson.

If the California Supreme Court had considered that federal question (unconstitutionality of burden-shifting statute), it would have entered a different judgment or granted a rehearing and entered a judgment consistent with Sandstrom, Johnson and (later) Carella. On April 10, 1989, Petitioner placed before the California Supreme Court the pendency (in this Court) of the case of Carella vs. California, and the fact that this Court had noted jurisdiction. Both in Carella and in Rosenthal (Petitioner here) the attacks were directed to California statutory shifting of burden of proof of non-culpability to the accused, thus reversing the presumption of innocence. On April 10th, at the time Petitioner had presented this attack, Carella was then scheduled for hearing, on the question of the unconstitutional statute, on April 26, 1989, and that fact was brought to the attention of



the California Supreme Court.

SECOND GROUND

State statute (B & P Code 6049.1) abridging federal constitutional right of confrontation is facially unconstitutional inherently under the due process clause of the 14th Amendment and under the confrontation clause of the 6th Amendment.

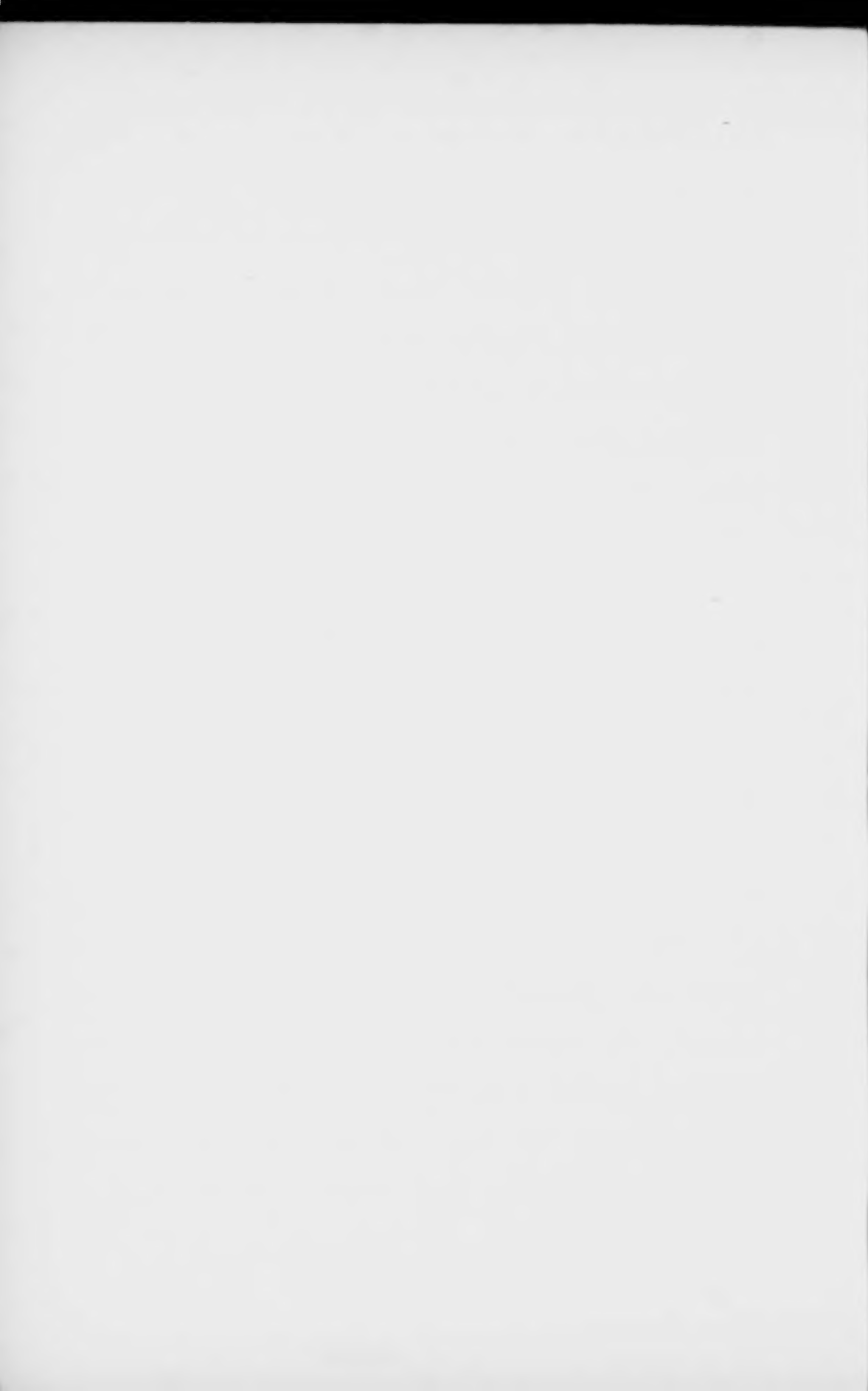
In its final judgment on October 11, 1989, California Supreme Court again refused to determine the retroactivity of Coy vs. Iowa and thereby determine the facial unconstitutionality of the statute, B & P Code 6049.1.

Another extrinsic mistake of the California Supreme Court occurred in its consideration of the presentation made by Petitioner in oral argument and in briefing. Although the issue of federal unconstitutionality of B & P Code, Section 6049.1 was considered and rejected by the



California Supreme Court in its Opinion/Judgment, in that Court's discussion of Petitioner's contention wherein Petitioner contended that his 6th Amendment confrontation rights were thereby violated, the California Supreme Court failed to consider the retroactive impact of Coy vs. Iowa (June 29, 1988) ___U.S.___, 108 S.Ct. 2798, 101 L.Ed.2d 857.

That Court's Opinion/Judgment was filed July 13, 1987, and again such determination was made in its Order (denying rehearing) of February 18, 1988 during the pendency of Coy vs. Iowa in this Court. If the California Supreme Court had been aware of that pendency, it would not have entered its Order/Judgment of July 13, 1987, or its Order denying rehearing (February 18, 1988) both of which upheld the constitutionality of B & P Code Section 6049.1 against constitutional attack, the validity of which attack was determined and reaffirmed by Coy. Thus, the California



Supreme Court mistakenly rejected the confrontation attack without awaiting the announcement of the decision in Coy vs. Iowa was decided by the U.S. Supreme Court on June 29, 1988 holding that the right of confrontation (and at least by implication the companion right of cross examination) is absolute, inviolate and indispensable under the due process clause of the 14th Amendment, precisely what Petitioner had raised and urged before the California Supreme Court, prior to Coy. Again, in its final judgment of October 11, 1989, Appendix 2, the California Supreme Court rejected the constitutional challenge based on Coy and the precedents that Coy followed, including Willner v. Committee, supra.

REASONS FOR GRANTING THE WRIT

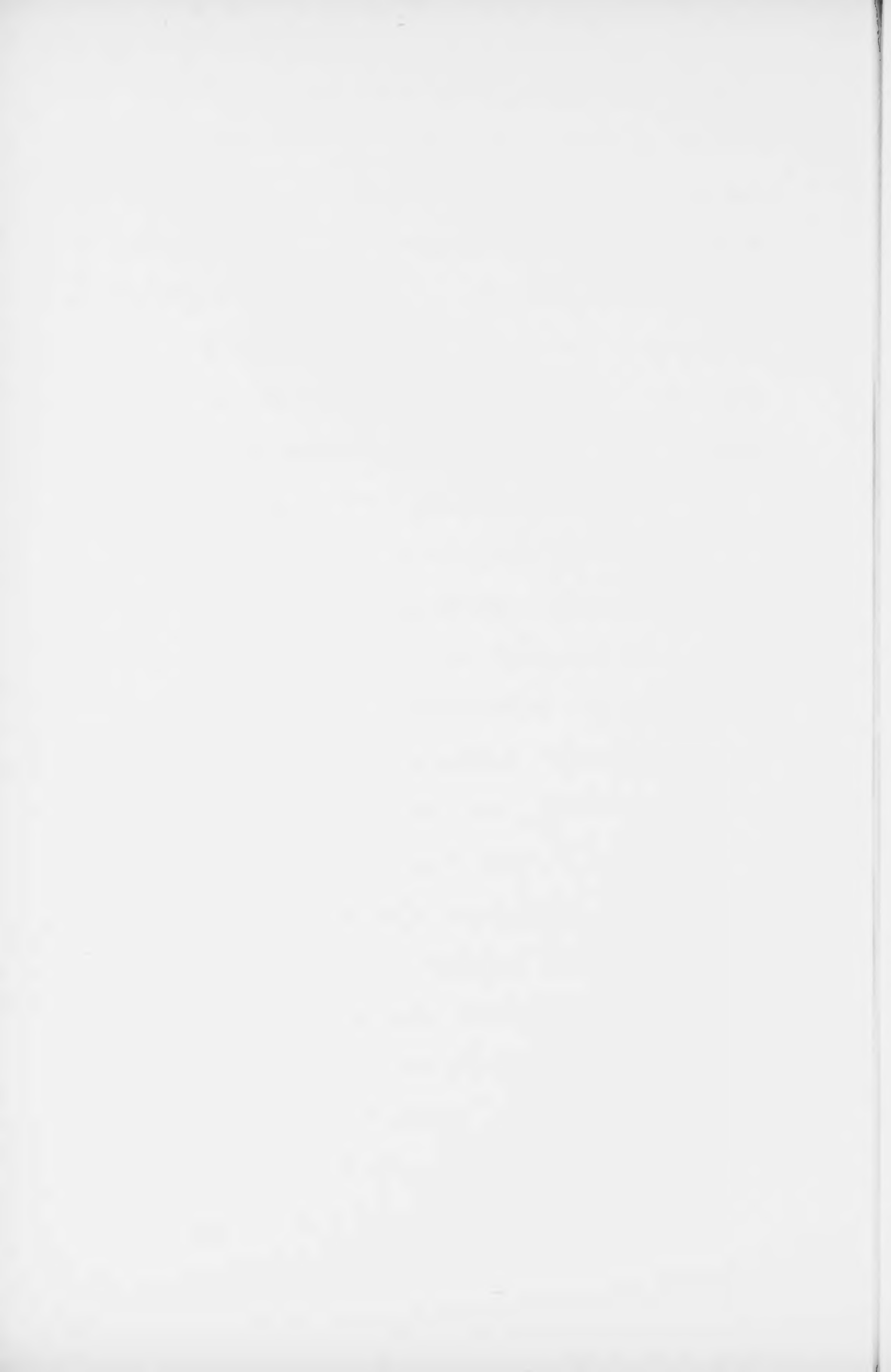
QUESTIONS ARE SUBSTANTIAL

The first of the two statutes here under



attack (B & P Code 6083(c), shifting the burden of proof of innocence to the accused, and concomitantly denying him the time-honored right of the presumption of innocence) is another example of California's legislative disregard, for the presumption of innocence, and the contrary presumption of wrongdoing, both of which were condemned not only in Sandstrom vs. Montana and Connecticut vs. Johnson, but specifically here, in Carella vs. California. Carella is the offspring of a long and prestigious line of precedents in this Court, including Sandstrom (a recent offspring) and McFarland vs. American Sugar (1915) 241 U.S. 79; Morrison vs. California (1934) 291 U.S. 82; Pollock vs. William (1944) 322 U.S. 4; Taylor vs. Georgia (1942) 315 U.S. 25; Green vs. McElroy (1958) 360 U.S. 474- all of which cases arose as statutory due process violations in civil litigation.

The second statute challenged here concerned constitutionality of B & P Code



6049.1, which denies confrontation and cross examination rights. That position of the California Supreme Court creates an extremely substantial question. Notwithstanding the clear mandate of this Court, as elucidated in Coy vs. Iowa (reaffirming Willner and an unbroken line of decisions in this Court) and notwithstanding the retroactive applicability of Coy vs. Iowa, the California Supreme Court has arbitrarily and capriciously rejected both the decisions of this Court reaffirming and upholding the fundamental nature of the rights of confrontation and cross-examination, as well as the decisions of this Court making the principle of Coy retroactive.

Whether the two statutes (one shifting burden proof of innocence, and the other denying the right of confrontation and cross-examination) are considered separately or together, California's impact is severe quantitatively, as well as fundamentally in kind. California is our most populous state,



and has at least more than its share of lawyers, per capita, or otherwise. The number of disciplinary cases keeps rising along with the number of licensed attorneys who should be accorded due process on a par with other persons.

CONCLUSION

The two statutes are codified legislative deprivations of due process, and cannot withstand constitutional attack under the 6th and 14th Amendments, consistent with the controlling decisions of this Court.

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Therefore, it is respectfully submitted that this Court should issue its Writ of Certiorari to the California Supreme Court, or, per curiam, vacate the July 13, 1987 Order/Opinion of the California Supreme Court.

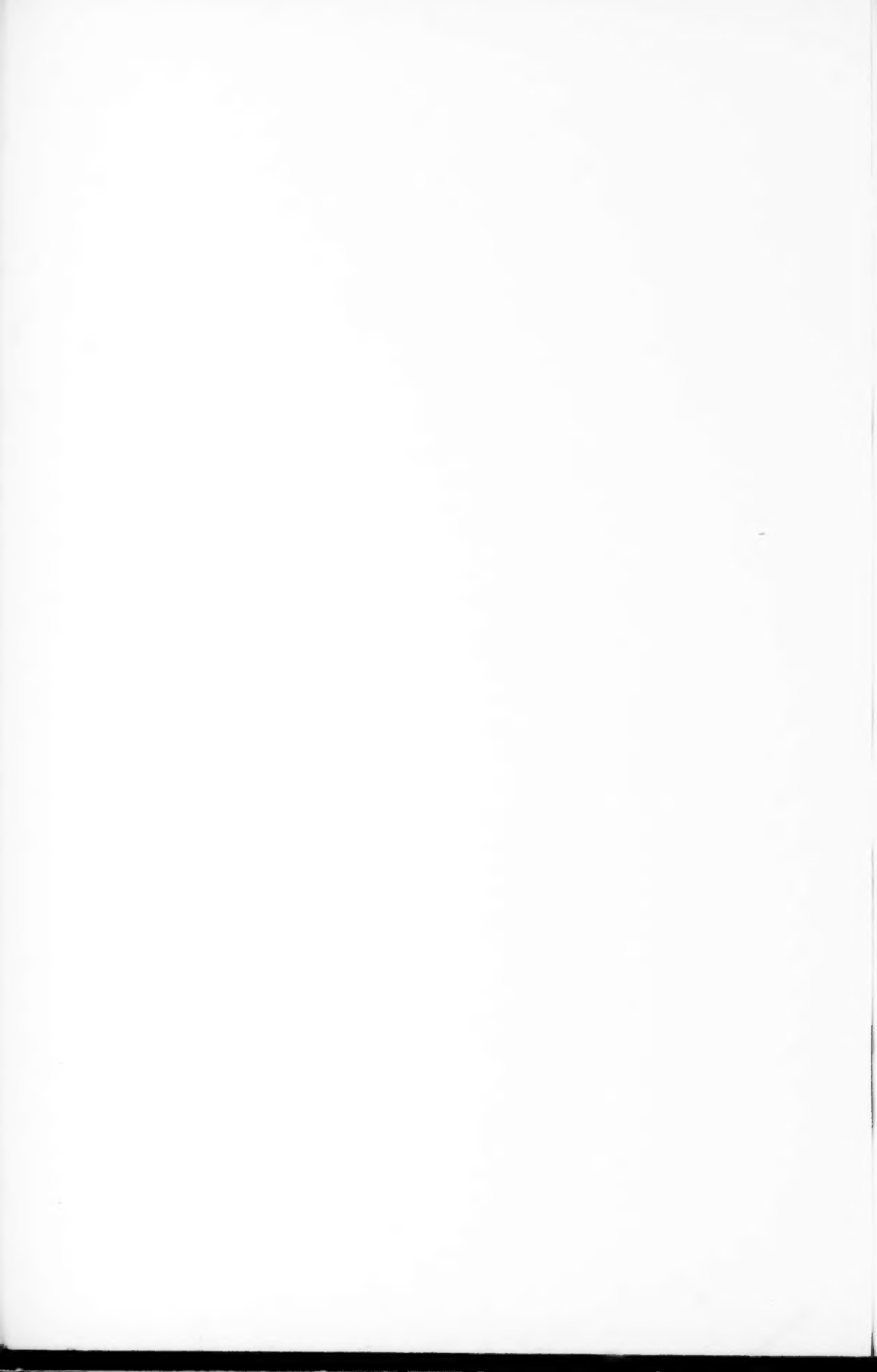
DATED: January 5, 1990.



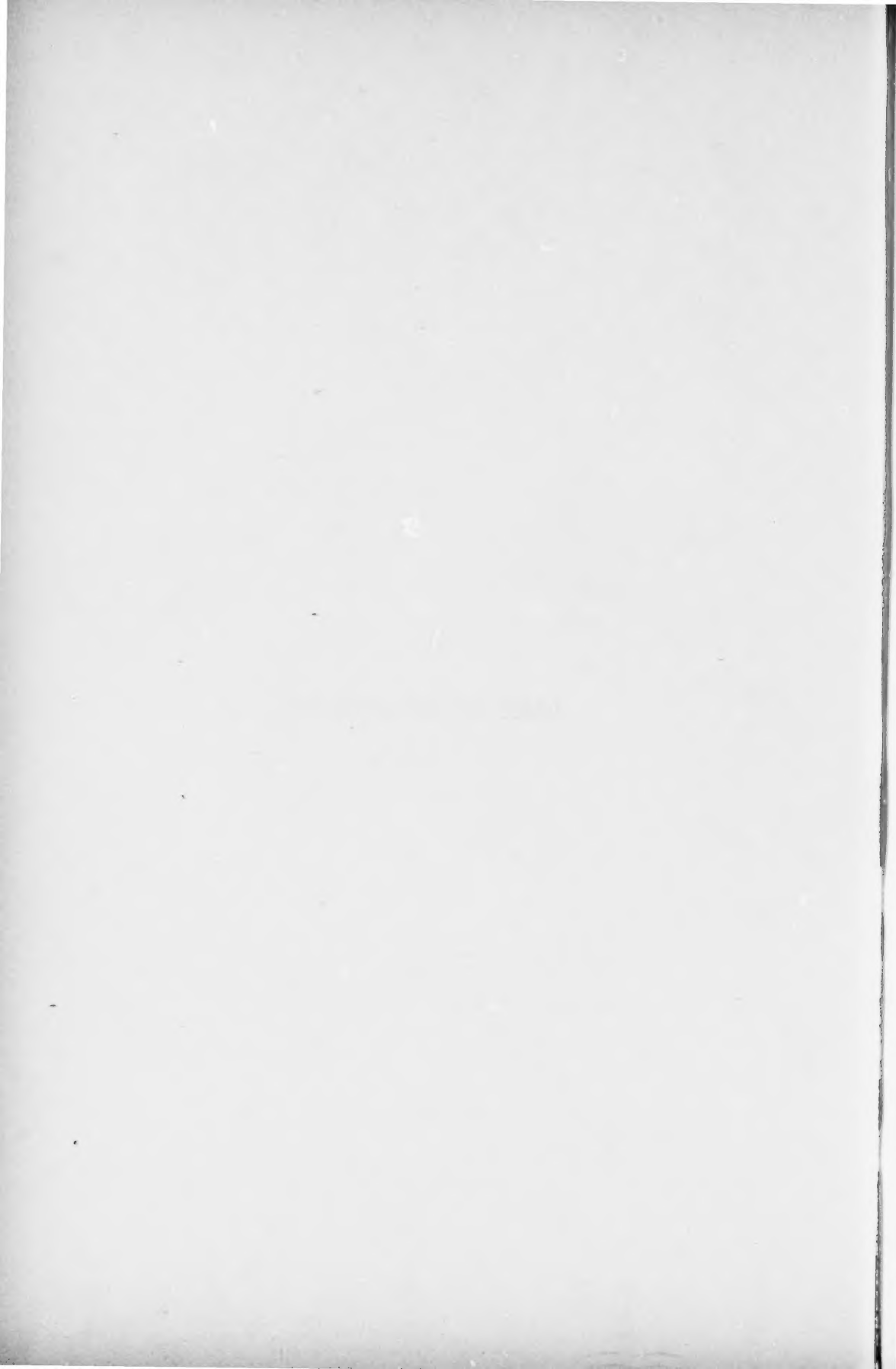
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(List of Appendices follows p. 17)



LIST OF APPENDICES



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<u>NO.</u>	<u>Description</u>
1	Petition for Writ of Error (and Supplement to Petition) to California Supreme Court
2	October 11, 1989 California Supreme Court Final Judgment
3	Notice of Appeal (and Amended Notice of Appeal) to U.S. Supreme Court
4	Opinion, California Supreme Court, filed July 13, 1987

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